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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CONTINENTAL CASUALTY COMPANY
11 AND AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA,

12 Plaintiffs,

13 v.

14 C.D. STIMSON CO.,
15

16 Defendant.

Case No. C17-235 RSM

ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

17 This matter comes before the Court on cross-motions for summary judgment filed by
18 Plaintiffs Continental Casualty Company and American Casualty Company of Reading,
19 Pennsylvania (collectively referred to herein as "CNA"), and by Defendant C.D. Stimson
20 Company ("Stimson"). Dkts. #18 and #22. CNA moves for an order declaring it does not owe
21 Stimson a duty to defend for conditions being placed on its permit to redevelop its commercial
22 property. Stimson moves only for summary judgment on the issue of CNA's duty to indemnify
23 Stimson. For the reasons stated below, the Court GRANTS CNA's Motion and DENIES
24 Stimson's Motion.
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I. BACKGROUND

Defendant Stimson has operated in Seattle since roughly 1888. Dkt. #24 (“Bayley Decl.”), ¶ 2. Among other businesses, it operated a lumber mill on the shore of Salmon Bay in the Ballard neighborhood north of downtown Seattle from 1888 until 1955. *Id.*; *see also* Dkt #25 (“Stumpf Decl.”), Ex. 3 at 08732.¹ The mill property is approximately 11.08 acres in size and is located on Shilshole Avenue Northwest in Seattle (the “Property”). Stumpf Decl. Ex. 3 at 08737.

Before 1955, a portion of the mill was built on pilings extending over the water and tidelands of Salmon Bay. *Id.* at 08732. Byproducts of mill operations, primarily wood debris and sawdust, were deposited on the Property and adjacent tidelands. *Id.*

Stimson closed the mill in 1955, and the mill’s buildings were demolished in 1957 and 1958. *Id.* A bulkhead was constructed in 1959 and the site was filled. *Id.* The fill material included sawdust from the mill’s activities and approximately 800,000 cubic yards of fill from the Interstate 5 highway construction project. *Id.* Between 1959 and 1979, Stimson built four warehouse and office buildings and a 250-slip marina on the Property. *Id.* at 08737, 08738. Stimson leases the office space, the warehouse space, and the slips in the marina to various tenants. Bayley Decl. ¶ 2.

A. Soil Contamination and Proposed Cleanup

The parties agree that the soil in the Property is contaminated. Soil samples collected from the Property contained diesel- and oil-range petroleum hydrocarbon (“DRPH” and “ORPH,” respectively) concentrations that exceed the Model Toxics Control Act (“MTCA”) Method A cleanup levels of 2,000 milligrams per kilogram (mg/kg). The highest concentration

¹ The Court will adopt the parties’ citation method referring to exhibit numbers and Bates stamp numbers. “08732” refers to the Bates stamp “Stimson08732,” located at Dkt. #25-1, page 33.

1 of ORPH was 74,000 mg/kg collected at a depth of 20 feet below ground surface, a
2 concentration so high that an oil sheen could be seen with the naked eye. Stumpf Decl. ¶ 8, Ex.
3 6 at 03022. The highest concentration of DRPH was 29,000 mg/kg, also collected at a depth of
4 20 feet. *Id.* ¶ 8, Ex. 6 at 03022. Samples of groundwater collected from the same location were
5 contaminated with ORPH at a concentration of 1,800 micrograms per liter (µg/L), which
6 exceeds the MTCA Method A cleanup level in groundwater of 500 µg/L. *Id.* ¶ 8, Ex. 6 at
7 03022.
8

9 Additionally, the sawdust and wood debris are decomposing and causing the emission of
10 methane gas at concentrations exceeding permissible MTCA levels. *Id.* Ex. 3 at 08745, 08748.
11 Under MTCA, any concentration of methane over 0.5% exceeds the Method B and Method C
12 air cleanup levels. *See id.* ¶¶ 11, 14. Testing has revealed concentrations of methane at 0.44% to
13 64% beneath the Property. ¶ 11.
14

15 Stimson admits that its activities on the Property before 1960 caused the above
16 contamination. *See* Stumpf Decl. Ex. 3 at 08748. The methane build up is predictable from the
17 presence of the sawdust and wood debris, and petroleum hydrocarbon pollution can be
18 explained by oil used for mill operations. The contaminated soil is located very near the former
19 saw mill, where saws and machinery were frequently oiled, and the depth of the contaminated
20 soil was 20 feet below ground surface, beneath fill deposited on the Property. *Id.* Ex. 6 at
21 03023. The soil above was not contaminated. *See id.* Ex. 6 at 03021-22.
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24 In January 2008, Stimson applied to the City of Seattle (“City”) to subdivide the
25 Property. Dkt. #23 (“Wu Decl.”) Ex. 1. The City approved Stimson’s application, and
26 subdivided the property into eight parcels: Parcels R, S, T, V, W, X, Y, and Z. *Id.*
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1 The parcel furthest to the north—Parcel R—is currently used as a parking lot and was a
2 starting point for Stimson’s redevelopment plans. Stimson has referred to this property as the
3 “Salmon Bay Center.” Beatty Decl., Ex. 1 at 4. The first step in redeveloping Parcel R was to
4 submit the application for the Master Use Permit (“MUP”). The Seattle Land Use Code, Title
5 23 of Seattle Municipal Code (the “Code”), requires issuance of a MUP for any proposed
6 development that requires a State Environmental Policy Act (“SEPA”, Chapter 43.21C RCW)
7 threshold determination. SMC 23.76.006(B)(6), (C). Stimson’s proposed redevelopment of
8 Parcel R is subject to environmental review under SEPA, and thus required a MUP. Stimson
9 applied for a MUP for Parcel R in September 2009, shortly after the City approved the
10 subdivision. Wu Decl. Ex. 7.

13 When the City processes an MUP application, the application is circulated for review by
14 all departments that have jurisdiction over an element of the proposal. *See* Wu Decl. Ex. 17. If
15 the departmental review of the MUP application identifies any corrections necessary to comply
16 with the Code, the City issues a “correction notice” to the applicant. *Id.* A correction notice
17 may also require the applicant to submit additional information so that the City may make a
18 determination of code compliance. *Id.*; see also SMC 23.76.010(E)(2), (F). Once the City issues
19 a correction notice, the applicant must respond in order for the City to continue processing the
20 application. *See* SMC 23.76.005(A); *see also* SMC 23.76.010(F).

23 For the Parcel R MUP application, the City issued a correction notice dated December 9,
24 2009 (“Correction Notice”), which instructed Stimson to respond. Wu Decl. Ex. 2 at 13172.
25 The Correction Notice identified several conditions that Stimson was required to address for the
26 City to continue processing the application, including several environmental conditions. *See*
27 Wu Decl. Ex. 2. Stimson was required to participate in a Voluntary Clean-up Program
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1 (“VCP”). Stimson and the City went back and forth. *See* Dkt. #22 at 7–8. The City eventually
2 granted the application and issued the MUP on February 7, 2013. Wu Decl. Ex. 7 at 24852.

3 After pausing during the recession, Stimson resumed redevelopment of the Property in
4 February 2016. Stimson submitted its application to the Washington Department of Ecology
5 (“WDOE” or “Ecology”) to re-enroll in the VCP on February 5, 2016. Stumpf Decl. Ex. 2. As
6 part of enrollment in the VCP and as a condition to issuance of a No Further Action (“NFA”)
7 letter, Ecology required Stimson to (1) investigate and characterize the scope of contamination,
8 (2) prepare a Remedial Investigation and Feasibility Study, (3) prepare the Cleanup Action
9 Plan, and (4) request an opinion from Ecology. *See id.* Exs. 2-4; Wu Decl. Ex. 15. With its
10 application, Stimson submitted the Remedial Investigation and Feasibility Study dated February
11 4, 2016. Stumpf Decl. Exs. 2, 3. Stimson later submitted its Cleanup Action Plan dated August
12 26, 2016. *Id.* Ex. 4. Ecology accepted Stimson’s application for entry into the VCP on January
13 20, 2017, and issued an opinion letter dated January 3, 2018. Bayley Decl. Ex. 2; Stumpf Decl.
14 Ex. 5.

15 **B. Insurance Coverage**

16 Between 1969 and 1979, Stimson purchased primary comprehensive general liability
17 policies from CNA (“Primary Policies”). *See* Bayley Decl. ¶ 5, Exs. 3-7. The Primary Policies
18 require CNA to defend Stimson against “suits” and to pay all sums Stimson is “legally obligated
19 to pay as damages.” *E.g., id.*, Ex. 4. Stimson also purchased umbrella excess liability policies
20 from CNA containing similar indemnification language (“Umbrella Policies,” and together with
21 the Primary Policies, “Policies”). *See id.*, Exs. 8–13. The Umbrella Policies cover (1) liabilities
22 covered by the primary policies but exceeding their limits and (2) liabilities not covered by the
23 primary policies but exceeding retained limits. *Id.*

1 On December 24, 2015, Stimson provided notice to CNA of its potential claims under
2 the Policies for damages, defense, and indemnity related to environmental contamination and
3 cleanup costs at the Property. Wu Decl. Ex. 8. The letter asserted “Stimson faces significant
4 liability related to soil, ground water, and methane gas contamination identified at the Property,
5 including investigation and cleanup and other related losses because of coercive requirements
6 mandated by the City of Seattle (the “City”) and the Washington Department of Ecology
7 (“Ecology”).” *Id.* The letter went on:

9 As a condition of entitlements for redevelopment of Parcel R,
10 Stimson is required by the City of Seattle to investigate the
11 contamination, clean up the Property, and implement certain
12 mitigation measures to address the methane gas. Specifically, the
13 City conditioned the Master Use Permit for the Parcel R
14 redevelopment on the creation of a Methane Mitigation Plan and
15 participation in Ecology's Voluntary Cleanup Program. . . . The
16 City and Ecology's requirements are coercive and require Stimson
17 to investigate and clean up the Property in compliance with
18 MTCA.

19 *Id.*

20 CNA initially accepted the claim under a reservation of rights by letter dated May 16,
21 2016. *Id.* Ex. 9. CNA paid a portion of the expenses that Stimson submitted for
22 reimbursement. Beatty Decl., Ex. 56.

23 On September 1, 2016, Stimson tendered \$363,671.47 in environmental expenses to
24 CNA. Wu Decl., Ex. 10. These expenses consisted of environmental consultant fees and
25 attorneys’ fees incurred to investigate the scope and extent of contamination and to prepare the
26 cleanup action plan. *See id.* Stimson has since incurred at least \$68,158.40 in additional
27 expenses to further investigate its liabilities under MTCA. *Id.* at ¶ 15. Of Stimson’s expenses,
28 CNA paid only \$41,218.89 by letter dated December 13, 2016. *Id.*, Ex. 11. CNA rejected the
remainder of the expenses tendered by Stimson. *See id.*

After Stimson refused CNA's demand to withdraw the remainder of its claim (*see* Wu Decl., Ex. 12), CNA filed this action against Stimson for declaratory relief on the duty to defend. Dkt. #1 and #4. Stimson counterclaimed for declaratory relief, breach of contract, bad faith, violation of the Insurance Fair Conduct Act, and violation of the Consumer Protection Act. Dkt. #13. Only the claims for declaratory relief are now before the Court. In response to CNA's lawsuit, Stimson conducted further investigation of its environmental liabilities. Stimson's expert prepared a report dated September 1, 2017, detailing her findings that contaminated soil from the Property was contaminating groundwater in excess of levels permissible under MTCA. *See* Stumpf Decl. Ex. 6.

A. Legal Standard for Summary Judgment

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable

1 inferences in favor of the non-moving party. *See O'Melveny & Meyers*, 969 F.2d at 747, *rev'd*
2 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a "sufficient
3 showing on an essential element of her case with respect to which she has the burden of proof"
4 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

5 **B. CNA's Motion**

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7 The interpretation of insurance policies is a question of law. *Weyerhaeuser Co. v. Aetna*
8 *Casualty & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). The language of the policy is
9 to be interpreted in accordance with the way it would be understood by the average person,
10 rather than in a technical sense. *Id.* An ambiguity exists in an insurance contract if the
11 language is fairly susceptible to two different reasonable interpretations. *Id.* When the parties'
12 language is ambiguous, courts attempt to enforce the parties intent. *Greer v. Nw. Nat'l Ins. Co.*,
13 109 Wn.2d 191, 200, 743 P.2d 1244 (1987).
14

15 Washington law imposes on insurers a broad duty to defend their insureds. *See, e.g.,*
16 *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn. 2d 55, 64, 1 P.3d 1167 (2000).
17

18 CNA frames the issues in its Motion as:

19 1. Where an insured under a general liability insurance policy
20 applies for land use and building permits for commercial property
21 development, and as a condition for issuance of permits is
22 informed that (1) it must enroll in the Washington Department of
23 Ecology's Voluntary Cleanup Program, and (2) it must prepare a
24 methane mitigation plan to avoid asphyxiation and explosion risks
in the proposed commercial building, is the permit condition the
functional equivalent of a lawsuit requiring liability insurers to
provide a "defense"?

25 2. Where the Washington Department of Ecology issues an
26 advisory opinion letter establishing conditions for issuing a "No
27 Further Action" letter for a property enrolled in the WDOE's
28 Voluntary Cleanup Program, and a party participating in the
Voluntary Cleanup Program may unilaterally withdraw from the

1 program at any time, are the conditions the functional equivalent of
2 a lawsuit requiring liability insurers to provide a “defense”?

3 Dkt. #18 at 15. The Court generally agrees with this framing of the facts and legal issues.

4 The policies at issue in this case provide that CNA “shall have the right and duty to
5 defend suit against the insured seeking damages.” *See e.g.*, Bayley Decl Ex. 4. The term “suit”
6 is not defined.

7 CNA argues that the duty to defend is not triggered until a “suit” has been filed against
8 the insured, and that no such suit has occurred here. Dkt. #18 at 17. The term “suit,” when not
9 specifically defined in an insurance policy, has been held to be ambiguous in the environmental
10 liability context as to the type of third party action that triggers the duty to defend. *Id.* (citing
11 *Gull Industries, Inc. v. State Farm Fire & Casualty Co.*, 181 Wn. App. 463, 477, 326 P.3d 782
12 (2014).)
13

14 Both parties cite to *Gull* for the Court’s consideration. *See* Dkt. #22 at 12. In *Gull*, the
15 insured undertook voluntary remediation of contaminated soil and groundwater at a gas station
16 and notified the WDOE of its cleanup. The WDOE sent an acknowledgement letter but did not
17 threaten any enforcement action. In a subsequent insurance coverage action, the court held that
18 the word “suit” does not require a formal complaint filed in court and may include
19 “administrative enforcement acts that are the functional equivalent of a suit.” *Id.* This holding
20 is relied on by Stimson. However, the court also held that an acknowledgement letter from the
21 WDOE was not sufficiently coercive to trigger a duty to defend because the letter “did not
22 present an express or implied threat of immediate and severe consequences.” *Id.* at 478.
23

24 Here, Stimson has not undertaken voluntary remediation of contaminated soil and then
25 notified the WDOE, as was the case in *Gull*. However, it can be said that Stimson is voluntarily
26 developing its property and encountering administrative obstacles to that development. If
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1 Stimson decides the costs of redevelopment are too high, it may be able to simply scrap its plans
2 without facing any further liability. The communications from the WDOE prior to this lawsuit
3 do not present an express or implied threat of immediate and severe consequences if Stimson
4 simply maintains the status quo.² Stimson is not legally in a defensive position, yet.

5 The Court agrees with CNA that the January 3, 2018, “advisory opinion” from the
6 WDOE also does not *compel* cleanup action. *See* Beatty Decl. Ex. 50 at 1. While the letter lists
7 measures that must be taken before the WDOE would issue an NFA letter, the letter does not
8 threaten any other consequences if Stimson does not take such measures; the only consequence
9 would be that Stimson might not receive a NFA letter, which would simply maintain the status
10 quo.
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12 The Court agrees with CNA that the WDOE’s advisory role in this VCP stands in stark
13 contrast to the enforcement methods the agency could use under MTCA to compel cleanup of
14 hazardous materials. The WDOE is empowered to issue orders requiring site cleanup. RCW
15 70.105D.050(1).
16

17 Given all of the above, the Court concludes that CNA’s duty to defend has not yet been
18 triggered and grants summary judgment for CNA on its declaratory judgment claim.
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20 **C. Stimson’s Motion**

21 An insurer’s duty to defend and its duty to indemnify are different obligations, analyzed
22 separately. *Weyerhaeuser*, 123 Wn.2d at 902. Stimson argues that “[w]hether an agency has
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24 ² As CNA notes, “[i]n its VCP acceptance letter to Stimson, the WDOE does not tell Stimson that it is required to
25 do anything, other than inform Stimson of data submittal procedures and request that technical data, if any, be
26 provided by an appropriately licensed professional.” Dkt. #18 at 20 (citing Beatty Decl., Ex. 48). The letter notes
27 that Stimson had requested a written opinion on the sufficiency of its cleanup, and that the WDOE would review
28 material submitted by Stimson and provide such an opinion. Beatty Decl. Ex. 48 at 2. The VCP Agreement
entered between Stimson and the WDOE also lacks explicitly compulsory language. *See* Beatty Decl. Ex. 49. The
Agreement states that its purpose “is to facilitate independent remedial action at the Site.” *Id.* The WDOE agreed
to provide site-specific technical consultations, which could include assistance in identifying applicable regulatory
requirements and opinions on whether particular remedial actions met those requirements. *Id.* The Agreement
further provides that opinions provided by the WDOE under the Agreement would be “advisory only.” *Id.* The
Agreement may be unilaterally terminated by either party without cause. *Id.*

1 been ‘coercive or adversarial’ is irrelevant in determining whether a duty to indemnify exists,
2 and that “[t]he only relevant analysis is whether the insured was or is ‘legally obligated’ to pay
3 the expenses at issue.” Dkt. #22 at 20 (citing *Weyerhaeuser*, 123 Wn.2d at 901-02). Stimson
4 argues that its liability under MTCA is indisputable. It is true that MTCA imposes strict, joint,
5 and several liability on, among others, the owner of a contaminated property, the owner of a
6 contaminated property at the time of a release of a hazardous substance, and any person who
7 arranges for disposal of a hazardous substance on a property. RCW 70.105D.040(1)(a)-(c).
8 These “potentially liable persons” (“PLP”) may assert only a few, very narrow, defenses to
9 MTCA liability. See RCW 70.105D.040(3); .020(26). Stimson argues that, due to its long-time
10 ownership and control of the Property and the former mill, it indisputably meets the statutory
11 definition of “potentially liable party” and no MTCA defenses apply. See RCW
12 70.105D.020(26); 70.105D.040(3). The Policies require CNA to indemnify Stimson for “all
13 sums which the insured shall become legally obligated to pay as damages. . . .” See, e.g., Bayley
14 Decl. Ex. 4.

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17 In Response, CNA argues that “the entirety of the costs for which Stimson has requested
18 reimbursement consists of costs that would be categorized [under the applicable WAC] as
19 “defense” if there were anything to defend.... Stimson’s costs at this point are voluntary
20 business expenditures incurred for the purpose of developing its property.” Dkt. #27 at 5. CNA
21 cites to WAC 284-30-390(3), which refers to payments an insurer would make, under its duty to
22 defend, for “costs reasonably incurred in an investigation to determine the source of
23 contamination, the type of contamination, and the extent of the contamination.” CNA argues
24 that *Weyerhaeuser* is factually distinct from this case, because the cleanup costs here are not
25 inevitable, because Stimson is not working in concert with the WDOE, and because there are
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1 fewer public health concerns than were present in that case. *See id.* at 6–7. CNA argues that
2 the Property is relatively stable from an environmental perspective. *Id.* at 7 (citing Dkt. #28
3 (“Carroll Decl.”), ¶ 3). CNA also points out that Stimson “itself has shown no urgency in the
4 21 years since it first had site studies performed, and instead has engaged in site investigation
5 only to the extent it would aid in the commercial development of the site.” *Id.*

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7 On Reply, Stimson argues that the expenses it has tendered are recoverable both under
8 the duty to defend and the duty to indemnify. Dkt. #30 at 3 (citing, e.g., *Teck Metals, Ltd. v.*
9 *Certain Underwriters at Lloyd’s, London*, 735 F. Supp. 2d 1260, 1267 (E.D. Wash. 2010)).
10 Stimson cites to *Douglass v. Shamrock Paving, Inc.*, 189 Wn.2d 733, 740-41, 406 P.3d 1155
11 (2017) for the holding that investigative expenses incurred to determine MTCA liability were
12 recoverable. *Id.* at 4.

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14 The Court has reviewed the briefing from both parties and concludes that Stimson has
15 failed to meet its burden of demonstrating that the costs at issue currently fall under CNA’s duty
16 to indemnify, or that the fact pattern of this case is sufficiently analogous to that in
17 *Weyerhaeuser* for the holding of that case to apply here. This conclusion is based in part on
18 remaining questions of fact as to whether Stimson is “legally obligated to pay” the expenses at
19 issue, and the nature of the risk posed by the environmental condition of the Property to the
20 surrounding area. The fact pattern of this case differs from *Douglass*, in that Stimson is not
21 paying investigative expenses to clean up a mess caused by Defendant, but is tendering an
22 insurance claim to Defendant for investigative expenses it has undertaken voluntarily in
23 furtherance of plans to develop its property. Given all of the above, the Court will deny
24 Stimson’s Motion.
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III. CONCLUSION

Having reviewed the relevant briefing, attached declarations, and the remainder of the record, the Court hereby finds and ORDERS:

1) Plaintiffs' Motion for Summary Judgment (Dkt. #18) is GRANTED. Plaintiffs do not owe Defendant Stimson a duty to defend with respect to the submitted expenses identified above.

2) Defendant Stimson's Motion for Summary Judgment (Dkt. #22) is DENIED. Stimson's counterclaims remain for consideration at trial.

DATED this 14th day of December 2018.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE